

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: MICHAEL BENGRY
FAA Order No. 2003-9

Docket No. CP00WP0020
DMS No. FAA-2000-7310¹

Served: September 12, 2003

DECISION AND ORDER²

This case involves an incident aboard a United Airlines flight from Maui to Los Angeles. Respondent Michael E. Bengry has appealed Administrative Law Judge (ALJ) Burton S. Kolko's decision³ finding that he committed three violations of 14 C.F.R. § 91.11, which prohibits assaulting, threatening, intimidating, or interfering with a crewmember.⁴ The ALJ assessed Bengry a \$3,300 civil penalty.

Bengry has appealed both the ALJ's finding of violations and the amount of the civil penalty. This decision affirms the ALJ's decision as to both.

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

³ A copy of the decision is attached.

⁴ Section 91.11 provides: "No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated." 14 C.F.R. § 91.11.

I. Facts

The parties do not agree on the facts. Complainant's version is that Bengry and his companion caused an ongoing disturbance aboard the flight. The chief flight attendant, whose duty station was in first class, went to the aft galley so that the other flight attendants could brief her on the disturbance. During this briefing, Bengry walked to the aft galley, despite the lit "Fasten Seat Belt" sign, and threatened that he would take photographs of the flight attendants for use in a lawsuit. When the chief flight attendant put up her hand to block the photograph he was about to take, Bengry grabbed her arm and twisted it.

Bengry's version is that even though he was a "premier passenger" of the airline, two flight attendants were rude to him, and he wanted to file a complaint about their behavior. Because the flight attendants would not tell him their names, he decided to take their photographs. According to Bengry, he went to the aft galley, but only when the seat belt sign was off. He testified that as he lifted his camera to his eye to photograph one of the offending flight attendants, he saw a hand coming towards him to hit him, and in self-defense, he reflexively grabbed the person's arm. After he took the camera away from his eye, he saw that it was the chief flight attendant who had just, in his words, attacked him. (Tr. 223.)

II. ALJ's Decision

The ALJ found that there was insufficient proof that the "Fasten Seat Belt" sign was lit when Bengry left his seat. Thus, he found no seat-belt violations.⁵

⁵ The complaint alleged that Bengry violated 14 C.F.R. § 121.317(f), which provides that every person who is required to be seated must be belted in while the "Fasten Seat Belt" sign is lit. The complaint also alleged that Bengry violated 14 C.F.R. § 121.317(k), which requires passengers to

The ALJ found, however, that Bengry committed three separate violations of Section 91.11, which prohibits assaulting, threatening, intimidating, or interfering with a crewmember. The first violation, according to the ALJ, was that Bengry assaulted the chief flight attendant by grabbing and twisting her arm. The second was that Bengry interfered with the chief flight attendant's duties by causing her absence from her regular tasks and by upsetting her, thereby substantially diminishing her ability to react to an emergency. The third and final violation was that Bengry interfered with the duties of the captain by causing him to have to leave the cockpit to deal with Bengry.

The ALJ assessed the maximum civil penalty per violation of \$1,100, for a total of \$3,300, reasoning that the violations were significant and adversely affected safety of flight.

III. Bengry's Appeal

A. Self-Defense

Bengry argues that any assault committed by him should be excused because he was acting in self-defense. The ALJ, however, did not believe Bengry's claim that he only grabbed the chief flight attendant in self-defense. In this regard, the ALJ stated that he "found Bengry generally evasive and not worthy of belief." (Initial Decision at 3 n.4.) In contrast, the ALJ found the flight attendants who testified that the chief flight attendant merely put up her hand to block the photograph to be credible witnesses. (*Id.* at n.3.) The ALJ's credibility determinations are entitled to deference on appeal because he observed the witnesses' demeanor. In the Matter of High Exposure, FAA Order

comply with crewmember instructions, including the instruction to be belted in while the "Fasten Seat Belt" sign is lit.

No. 2001-2 at 5-6 (May 16, 2001). Bengry has not pointed to anything in the record that would justify reversing the ALJ's credibility determinations.

While Bengry objects to the ALJ's finding that the chief flight attendant's act of putting her hand up to block the photograph was "a natural and understandable response," reversal of this finding would not alter the outcome in this case. Assuming, *arguendo*, that her behavior was inappropriate, it still would not justify or excuse Bengry's assault on her.

B. Antagonistic and Intimidating Behavior

Bengry also objects to the ALJ's finding that his attempt to take a photograph was "antagonistic and intimidating," even though he admits in his appeal brief that he took the photograph to lodge a complaint with the airline and that he threatened to sue the airline.⁶ (Appeal Brief at 4.) The definition of "antagonism" includes "actively expressed opposition or hostility."⁷ Given that Bengry coupled his attempt to take a photograph with threats to use the photograph for a lawsuit, the ALJ did not err in finding Bengry's actions antagonistic. Also, to the extent that this matter involves a credibility determination, the ALJ found that Bengry's behavior was actively hostile rather than

⁶ Bengry's appeal brief states:

In this case Respondent resorted to taking photographs of the flight crew members who had treated him and his companion rudely because he had no way to identify the individuals and he wanted to lodge a complaint with the airline. Flight attendants testified that they felt intimidated by Respondent's threat of filing a lawsuit, but their feelings cannot be blamed on Respondent.

Appeal Brief at 4 (citations omitted).

⁷ Webster's Ninth New Collegiate Dictionary.

simply assertive. As stated above, the ALJ's credibility findings are entitled to deference, and Bengry has provided no reason for disturbing them.

The record supports the ALJ's finding that Bengry's behavior was antagonistic.⁸ For example, a passenger seated in the row behind Bengry testified that Bengry was angry, loud, belligerent, and agitated, creating such a disturbance that at the end of the flight, when the police came onto the plane to take Bengry away, the other passengers clapped and cheered. (Tr. 13, 20-21.)

Bengry asserts that ordinary, reasonable people would not be intimidated by having their photographs taken. In fact, however, many ordinary, reasonable people would find it intimidating to be photographed by someone threatening them with a lawsuit and negative media exposure. In any event, reversing the ALJ's finding that the attempt to take a photograph was "antagonistic and intimidating" would not affect the outcome of this case. Given that the definition of assault includes unwelcome touching,⁹ Bengry still committed an assault.

C. Intent to Assault a Crewmember

On appeal, Bengry argues that he lacked the necessary intent, or scienter, to assault a crewmember because he did not know that the person whose arm he grabbed was a crewmember. No previous cases have addressed the issue of whether scienter is an element of a violation of Section 91.11. There are cases, however, that address whether scienter is required under a statute prohibiting assaults on federal officers. In such cases,

⁸ As stated above, Bengry has provided no reason to disturb the ALJ's credibility determinations.

⁹ In the Matter of Gotbetter, FAA Order No. 2000-17 at 11 (August 11, 2000).

the courts have held that it is unnecessary to prove that an assailant knew the victim was a federal officer. *See, e.g., United States v. Goldson*, 954 F.2d 51, 54 (2nd Cir. 1992); *Bennett v. United States*, 285 F.2d 567, 570-71 (5th Cir. 1960).¹⁰ According to the court in *United States v. Young*, 464 F.2d 160, 163 (5th Cir. 1972), when the defendant intends to assault the victim and has no legal excuse such as self-defense, “knowledge of the official capacity of the victim is invariably unnecessary; the assailant takes his victim as he finds him.”

Similarly, knowledge of the crewmember’s identity is not an element of a violation of 14 C.F.R. § 91.11. This regulation provides, in relevant part, that “[n]o person may assault . . . a crewmember in the performance of the crewmember’s duties” Section 91.11 does not contain an exemption for assailants who do not know they are assaulting a crewmember. All the regulation requires is the intent to assault, not the intent to assault a crewmember in particular. Thus, Bengry had the requisite intent.

D. Interference with the Chief Flight Attendant’s Duties

1. Absence from Her Duties

The ALJ found that Bengry interfered with the chief flight attendant’s duties by causing her to be absent from her regular duties. Bengry argues, however, that she was not absent from her regular duties because it was her duty to be updated by the crew and to handle any situation that might arise.

¹⁰ There is an exception for cases in which the defendant acts from the mistaken belief that he or she is about to be the victim of an intentional tort at the hands of a private citizen. *United States v. Goldson*, 954 F.2d at 55-56. But here, the ALJ rejected Bengry’s claim that he was acting only in self-defense. Instead, the ALJ found that Bengry willfully committed an assault and had no legal excuse.

The chief flight attendant testified that on the flight in question, her assigned duty station was first class, where she was working alone. (Tr. 72.) Flight attendants are responsible for handling both routine duties and emergencies in their assigned duty stations. For example, the chief flight attendant, by performing CPR, had once saved the life of a passenger who was having a heart attack. (Tr. 63.)

While it was indeed the chief flight attendant's duty to handle disturbances caused by passengers, Bengry still interfered with her duties at her assigned duty station. The disturbance Bengry caused was unnecessary and willful, unlike other unavoidable or accidental problems aboard flights. When the chief flight attendant was in the back dealing with Bengry, she was unable to handle routine duties and emergencies at her assigned duty station. (Tr. 118.) See In the Matter of Mayer, FAA Order No. 1997-12 (February 20, 1997) (stating that assaults distract crewmembers from the performance of their duties, and that safety and security problems may occur when an unruly passenger's actions call a flight attendant away from his or her normal duties).

2. Diminished Ability to Respond to an Emergency

The ALJ also found that Bengry interfered with the chief flight attendant's duties by upsetting her significantly, thereby diminishing her ability to react to an emergency. (Initial Decision at 4.) Challenging this finding, Bengry argues that the chief flight attendant herself "was the proximate or intervening cause of any upset due to her response to a passenger's [meaning his own] complaint." (Appeal Brief at 6.) However, it is normal for a person to be upset after an assault. Bengry appears to be blaming the chief flight attendant for the natural reaction that he caused.

Bengry also argues that it is speculative to say that her emotional distress diminished her ability to react to an emergency, because no emergency actually occurred. However, a decrement in work performance is another predictable result of an assault.

E. Interference with the Captain's Duties

After the assault, the captain had to leave the cockpit twice to deal with Bengry. Nevertheless, Bengry argues that he did not interfere with the captain's duties. Rather, he argues, it was the crew who caused the captain to leave the flight deck. According to Bengry, the crew blamed Bengry for his companion's inappropriate behavior, which caused him to assault the chief flight attendant, which in turn caused the captain to leave the flight deck.¹¹ It is difficult to see the logic in this argument. Bengry implies that he had no choice in the matter, but he alone is responsible for assaulting the chief flight attendant.

F. Knowledge

Bengry claims that he was only asserting himself as a customer and he did not know that doing so would violate the regulations. He says that the flight crew did not inform him about the rules, and that punishing him without any warning would be unjust and would not deter either him or other passengers from future violations.

As the ALJ determined, Bengry did something far less benign than merely asserting himself. He assaulted a crewmember, and the assault led to interference with

¹¹ Bengry's appeal brief states:

It was the flight crew's response in blaming Respondent for Romano's [Bengry's companion's] acts that escalated this situation and caused the captain to leave the flight deck. The captain left the flight deck after the assault on [the chief flight attendant], but why did that assault occur? It occurred because the flight crew lumped Respondent and Romano together and blamed Respondent for Romano's behavior instead of dealing with them as two individuals.

the duties of two crewmembers. Bengry's argument that he did not realize that it was a violation of the law to assault a crewmember strains credulity. In any event, "mistake of law is no defense." Tubos de Acero De Mex. v. Am. Int'l Inv. Corp., 292 F.3d 471, 479 (5th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 16462 (5th Cir. 2002). Contrary to Bengry's argument, holding him accountable for the violations would indeed serve the purpose of deterrence.

G. Sanction

Bengry challenges the ALJ's assessment of the maximum civil penalty for the violations, arguing that he should not be assessed the maximum civil penalty given that "he played only one role among many others" in the situation. (Appeal Brief at 9.) Thus, he suggests, the crew was at least in part responsible for the incident. Nothing the crew did, however, justified Bengry's assault on the chief flight attendant and the accompanying interference with her duties and the captain's duties. This argument does not provide a valid basis for reducing the civil penalty.

The ALJ's justification for assessing the maximum civil penalty included the following statement:

Mr. Bengry assaulted a flight attendant. This conduct plainly is intolerable in itself. But it also compromised the attendant's authority and removed her from her safety tasks. As such, Bengry's actions undermined the flight's safety.

(Initial Decision at 5.) Bengry attacks this statement, arguing that there is no evidence in the record that the chief flight attendant's authority or the safety of the flight were undermined. (Appeal Brief at 6.)

The chief flight attendant testified that as Bengry grabbed her arm and twisted it down, he said that he would do what he wanted to do. (Tr. 74.) This was a direct attack

on her authority, and the ALJ did not err in finding that the assault undermined her authority, especially since it occurred in the presence of her subordinates. See In the Matter of Mayer, FAA Order No. 1997-12 (February 20, 1997) (stating that assaults on flight attendants undermine their authority).

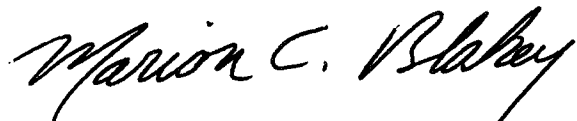
Nor did the ALJ err in finding that the assault and the interference undermined the flight's safety. Given that the captain and the chief flight attendant have critical safety duties, it would be impossible to find otherwise.

Further, flight attendants and other crewmembers have the right to be free from assault by passengers. In light of the danger and harm caused by Bengry's actions, it would be inappropriate to reduce the civil penalty.

In fact, had these violations occurred more recently, Bengry likely would have been assessed a much higher penalty. Under current law, passengers who assault or interfere with crewmembers are subject to a civil penalty of up to \$25,000 per violation.¹²

IV. Conclusion

For the foregoing reasons, this decision affirms the ALJ's decision and assesses a civil penalty of \$3,300.¹³



MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of September, 2003.

¹² 49 C.F.R. § 46318 (2003).

¹³ Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).